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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

STANMORE C. COOPER,)	Case No. C 07-1383 VRW
)	
Plaintiff,)	DEFENDANTS' NOTICE OF MOTION
)	AND MOTION TO DISMISS
v.)	
)	Date: July 12, 2007
FEDERAL AVIATION)	Time: 2:00 p.m.
ADMINISTRATION; SOCIAL SECURITY)	Place: Courtroom 6, 17 th Floor
ADMINISTRATION; UNITED STATES)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Defendants.)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 12, 2007 at 2:00 p.m. in Courtroom 6, located on the 17th Floor of 450 Golden Gate Avenue in San Francisco, California, defendants will move this Court for an order dismissing the second cause of action for lack of subject matter jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and (6), on the grounds the second cause of action is time-barred and foreclosed by the Privacy Act. This motion is based on this notice, the following memorandum of points and authorities, the pleadings and papers on file in this action, the reply, and such oral argument as the Court may permit.

RELIEF SOUGHT

The defendants seek an order dismissing the second cause of action without leave to amend.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this Privacy Act lawsuit against three federal agencies, plaintiff also asserts a cause of action for invasion of privacy under the California Constitution. The only jurisdictional basis for such a claim would be the Federal Tort Claims Act (“FTCA”), but not only has plaintiff failed to pursue or exhaust his administrative remedies, but also, it is too late for him to do so under the statute. Additionally, the invasion of privacy cause of action should be dismissed because the Privacy Act is plaintiff’s exclusive remedy for the alleged conduct of which he complains: disclosure of his personal information by federal agencies. Accordingly, the second cause of action should be dismissed without leave to amend.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Is plaintiff’s second cause of action for invasion of privacy time-barred because plaintiff did not file an administrative claim within two years of discovering the disclosure?
2. Is plaintiff foreclosed by the Privacy Act’s comprehensive remedial scheme from bringing his second cause of action for invasion of privacy?

The answer to both questions is “yes.”

III. STATEMENT OF ALLEGATIONS

Plaintiff filed this action on March 8, 2007. He alleges he became a licensed pilot in 1964, and discovered he was HIV-positive in 1985. (Compl. ¶¶ 8-9.) He further alleges he applied for long term disability benefits with the Social Security Administration (“SSA”) in 1995 because of HIV-related complications. (*Id.* ¶ 11.) Additionally, plaintiff alleges he applied for (and obtained) medical certificates to enable him to continue as a pilot, but did not disclose his HIV-positive status on those applications. (*Id.* ¶¶ 17-18.) He also alleges that, on March 23, 2005, he learned the SSA had disclosed his HIV-positive status to the Federal Aviation

Administration (“FAA”) and Department of Transportation (“DOT”). (*Id.* ¶¶ 26-28.) Plaintiff was later indicted on three counts of making false statements to a government agency, and pled guilty to one count. (*Id.* ¶¶ 30-31.) Based on those allegations, plaintiff asserts two causes of action against all defendants: violation of the Privacy Act and invasion of privacy under the California Constitution. As relief, plaintiff seeks general damages, special damages and interest on both claims, and attorneys’ fees on his Privacy Act claim. (*Id.* ¶¶ 42, 47; “Prayer” paragraph.)

Plaintiff’s complaint contains no allegation that he presented any administrative tort claim to any of the relevant agencies (SSA, FFA, or DOT), nor that he exhausted his administrative tort remedies before filing suit.

IV. ARGUMENT

A. The Standards

Under Rule 12(b)(1), a court should dismiss a complaint where there is no subject matter jurisdiction, including cases where the federal government is a defendant and there is no explicit waiver of sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538, *reh’g denied*, 446 U.S. 992 (1980); *Hill v. United States*, 571 F.2d 1098, 1101 (9th Cir. 1978); *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997). In determining whether it has subject matter jurisdiction, a court is not limited to the allegations of the complaint, but may consider facts outside the pleadings. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *Wyatt v. Terhume*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Moreover, it need not assume the truth of the complaint’s allegations. *Thornhill Pub. v. General Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must determine whether the alleged facts, if true, would entitle the plaintiff to a legal remedy. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). A court should grant a Rule 12(b)(6) motion where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). While the material factual allegations are taken as true and construed in the light most favorable to the non-movant, allegations that are conclusory, vague or speculative are insufficient to

1 survive a motion to dismiss. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *Stack v.*
 2 *Lobo*, 903 F. Supp. 1361, 1369 (N.D. Cal. 1995).

3 **B. The Second Cause of Action Is Time-Barred**

4 1. The Only Possible Waiver of Sovereign Immunity for a State Law Claim
 5 for Invasion of Privacy is the FTCA

6 As a sovereign, the United States (including its agencies) is immune from suit, and can be
 7 sued only to the extent it has waived its sovereign immunity. *United States v. Mitchell*, 445 U.S.
 8 535, 538, *reh'g denied*, 446 U.S. 992 (1980); *Hill v. United States*, 571 F.2d 1098, 1101 (9th Cir.
 9 1978); *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). A waiver of sovereign
 10 immunity must be unequivocally expressed and narrowly construed; it cannot be implied or
 11 liberally interpreted. *United States v. King*, 395 U.S. 1, 4 (1969); *Balser v. Department of*
 12 *Justice*, 327 F.3d 903, 907 (9th Cir. 2003). Absent an explicit waiver of sovereign immunity, the
 13 District Court has no jurisdiction over actions against the federal government. *Mitchell*, 445 U.S.
 14 at 538; *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997). The plaintiff has the burden of
 15 establishing the waiver of sovereign immunity. *People ex rel. Irvin*, 170 F. Supp. 2d 1040, 1048-
 16 9 (E.D. Cal. 2001); *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990).

17 None of the three statutes plaintiff cites in his complaint waives sovereign immunity for
 18 the California tort of invasion of privacy. Section 552a of Title 28 of the United States Code (the
 19 Privacy Act) waives sovereign immunity only with respect to violations of that Act, and contains
 20 no waiver for claims under state law.¹ See 28 U.S.C. § 552a(g)(5). Section 1331 “is a general
 21 jurisdiction statute and does not provide a general waiver of sovereign immunity.” *Shanbaum v.*
 22 *United States*, 32 F.3d 180, 182 (3rd Cir. 1994). And section 1367 confers only supplemental
 23 jurisdiction and “does not constitute a waiver of sovereign immunity.” *United States v. Certain*
 24 *Land Situated in City of Detroit*, 361 F.3d 305, 308 (6th Cir. 2004).

25
 26
 27 ¹Moreover, as discussed below in Section C, the Privacy Act is plaintiff’s exclusive
 28 remedy for alleged disclosure of personal information by federal agencies.

1 Rather, the only possible waiver of sovereign immunity for a state tort claim of invasion
 2 of privacy is the FTCA. That Act waives the United States's sovereign immunity for money
 3 damages "for injury or loss of property, or personal injury or death caused by the negligent or
 4 wrongful act or omission of any employee of the Government while acting within the scope of
 5 his office or employment, under circumstances where the United States, if a private person,
 6 would be liable to the claimant in accordance with the law of the place where the act or omission
 7 occurred." 28 U.S.C. § 1346(b)(1). Thus, to the extent invasion of privacy is actionable against
 8 a private person under California law, the FTCA provides the only possible waiver of sovereign
 9 immunity for plaintiff's second cause of action.

10 2. Plaintiff Has Not Exhausted, and Cannot Now Exhaust, His
 11 Administrative Remedies Under the FTCA

12 In order to establish subject matter jurisdiction under the FTCA, however, a plaintiff must
 13 first present a written claim to the appropriate agency:

14 An action shall not be instituted upon a claim against the United States for money
 15 damages for injury or loss of property or personal injury or death caused by the
 16 negligent or wrongful act or omission of any employee of the Government while
 17 acting within the scope of his office or employment, unless the claimant shall
 18 have first presented the claim to the appropriate federal agency and his claim shall
 have been finally denied by the agency in writing and sent by certified or
 registered mail. The failure of an agency to make final disposition of a claim
 within six months after it is filed shall, at the option of the claimant any time
 thereafter, be deemed a final denial of the claim for purposes of this section.

19 28 U.S.C. § 2675(a). Additionally, the plaintiff must present the administrative claim within two
 20 years after it accrues, or it is "forever barred":

21 A tort claim against the United States shall be forever barred unless
 22 it is presented in writing to the appropriate Federal agency within
 two years after such claim accrues

23 28 U.S.C. § 2401(b). A claim "accrues" under the FTCA "when the plaintiff discovers, or in the
 24 exercise of reasonable diligence should have discovered, the injury and its cause." *Bartleson v.*
 25 *United States*, 96 F.3d 1270, 1277 (9th Cir. 1996) (internal quotations omitted). The claim
 26 presentment requirement "is jurisdictional in nature and may not be waived." *Burns v. United*
 27 *States*, 764 F.2d 722, 723 (9th Cir. 1985).

Here, the complaint contains no allegations that plaintiff exhausted his administrative tort remedies by presenting a claim to the appropriate agencies before filing suit. Nor could he do so at this point, for as the complaint alleges, plaintiff discovered the alleged harm – the disclosure of his medical information – on March 23, 2005, more than two years ago. Thus, the two-year statute of limitations for filing an administrative tort claim has expired, barring any cause of action under the FTCA.

C. The Second Cause of Action Is Foreclosed by the Privacy Act

Alternatively, the defendants move to dismiss the second cause of action on the ground the Privacy Act is plaintiff's exclusive remedy. The Privacy Act provides a "comprehensive scheme" for addressing and remedying alleged improper disclosure of personal information by federal agencies. *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 (6th Cir. 2002). It provides several forms of relief for alleged intentional or wilful disclosure of personal information: actual damages of at least \$1,000, reasonable attorneys' fees, and costs. 5 U.S.C. § 552a(g)(4). In light of that comprehensive remedial scheme, several courts have held the Privacy Act forecloses other causes of action based on conduct regulated by that Act. *See, e.g., Downie*, 301 F.3d at 697-8; *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 112-7 (D.D.C. 2005); *Newmark v. Principi*, 262 F. Supp. 2d 509, 517-8 (E.D. Pa. 2003); *Mittleman v. United States*, 997 F. Supp. 1, 10-1 (D.D.C. 1998); *Williams v. Department of Veterans Affairs*, 879 F. Supp. 578, 586-7 (E.D. Va. 1995).

Here, the very same alleged conduct underlies both of plaintiff's causes of action: the disclosure of his HIV-positive status by federal agencies. Moreover, that alleged conduct is expressly the type of conduct regulated by the Privacy Act. *See Williams*, 879 F. Supp. at 586 (plaintiff precluded from bringing *Bivens* claim based on disclosure of his medical information, where "[t]he Privacy Act directly addresses and regulates the conduct of which [he] complains."). Furthermore, the relief plaintiff seeks on his Privacy Act claim includes all the relief sought on his invasion of privacy tort claim (general and special damages in excess of \$1,000). *See Mittleman*, 997 F. Supp. at 10-1 (plaintiff foreclosed from bringing Fifth Amendment claim because "[t]he relief plaintiff seeks under the Fifth Amendment is the same as that afforded by

1 the Privacy Act.”). Given the above authorities, and the fact that the Privacy Act provides
 2 plaintiff with “a sufficient avenue for redress,” *see Hatfill*, 404 F. Supp. 2d at 112, plaintiff’s
 3 invasion of privacy cause of action should be dismissed.

4 The defendants are aware this Court was previously presented with the issue of the
 5 exclusivity of the Privacy Act, in connection with the motion to suppress filed by plaintiff in the
 6 criminal proceedings against him. (*See* Dec. 28, 2005 Order in *United States v. Cooper*, Case
 7 No. CR-05-0549 VRW, p. 6.) In ruling on that motion, the Court stated that, while it found the
 8 authorities on exclusivity to be persuasive, it would decline the government’s invitation to follow
 9 them without more. (*Id.*) However, because these are civil proceedings in which plaintiff is
 10 affirmatively pursuing monetary relief (as opposed to defending against criminal charges), the
 11 defendants respectfully believe it is appropriate for the Court to revisit the exclusivity issue in
 12 this very different context.

13 **V. CONCLUSION**

14 Plaintiff has not exhausted his administrative remedies under the FTCA and cannot now
 15 do so, for the time has passed. Additionally, he cannot bring a tort claim for invasion of privacy
 16 because the Privacy Act is his exclusive remedy. Accordingly, his second cause of action should
 17 be dismissed without leave to amend.

18 DATED: May 11, 2007

Respectfully submitted,

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 United States Attorney

/s/

LETITIA R. KIM
 Assistant United States Attorney